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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1798

RICHARD CARPENTER and
STEPHEN BORDERS - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent has raised several arguments in its Brief in Opposition which merit reply:

First, Respondent suggests and would have this Court believe that Petitioners have failed to satisfy the jurisdiction requirements for seeking a Writ of Certiorari from the Supreme Court of Kentucky. Respondent alleges that since the Supreme Court of Kentucky decided the issue on state procedural law only, Rule 19 (1) (a) precludes this Court from consideration of the Writ of Certiorari. [Respondent's Brief pp. 1-2.]

Petitioners submit that the jurisdiction requirement of Rule 19 has been satisfied beyond doubt. The Writ of Certiorari filed by Petitioners pertains to the Supreme Court of Kentucky's decision to retroactively apply a procedural rule and, thereby, uphold the Petitioners' convictions when it has been admitted by that Court and the Court of Appeals of Kentucky that there is no relevant or sufficient evidence connecting the Petitioners to any of the charged offenses. The Petitioners are simply contesting the manner in which the Supreme Court of Kentucky opted to uphold the convictions based on a procedural rule. The Court's retroactive application of that procedural rule, in effect, decided a federal question of substance in a way not in accord with applicable decisions of this Court. In particular, the Supreme Court of Kentucky's retroactive application of the procedural rule enunciated in *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) resulted in the convictions of these petitioners being upheld upon no evidence. The Court's retroactive application has produced a result which is in direct opposition to the clear mandate for acquittal enunciated by this Court in *Jackson* v. *Virginia,* —— U. S. ——, 61 L. Ed. 2d 560, 99 S. Ct. —— (1979) and, therefore, the jurisdiction requirements of 19 (1) (a) have been satisfied.

Respondent has conveniently neglected to focus this Court's attention on paragraph one of Rule 19. That paragraph specifically provides that this Court has discretion to review any reasons that are special and important and, furthermore, that this court is not bound

by the considerations of paragraph (1) (a) discussed above:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

Petitioners submit that a more special and important reason for granting this Writ of Certiorari is hardly imaginable. In short, a conviction based on no relevant or sufficient evidence cannot be upheld for any reason, let alone the retroactive application of a state procedural rule. Therefore, these Petitioners have also fulfilled the jurisdiction requirement of "importance" of Rule 19 (1) since the injustice they have suffered goes to the very heart of the Due Process Clause of the United States Constitution.

Secondly, Respondent would have this Court believe that the procedural rule enunciated in *Kimbrough* v. *Commonwealth,* Ky., 550 S. W. 2d 525 (1977) was not a new rule but merely "reiterated" prior law on the subject. Respondent alleges that "Kimbrough was not new law, but a reaffirmation and a rephrasing of prior, existing law". [Respondent's Brief pp. 12-13.] This is not true! The truth is that *Kimbrough* did not reaffirm, reiterate, or rephrase any prior existing law but rather substantially changed the law in effect at the time of Petitioners' trial.

Respondent alleges that *Kimbrough* did not create law, since the law was already there. As authority Respondent relys on Kentucky Criminal Rule (R.Cr.) 9.54 (2). [Respondent's Brief, Footnote 1, p. 13.] However, the Respondent's reliance on this rule is misplaced and illogical. R. Cr. 9.54 pertains to the duty of the Trial Court to submit instructions to the jury. The Commonwealth's reliance on that rule is illogical, since a Motion for Directed Verdict is effective without any assent from the jury. [Kentucky Civil Rule (C.R.) 50.01.] In other words, the Motion for Directed Verdict is made only to the trial judge and is strictly out of the scope of authority of the jury. To suggest that R.Cr. 9.54 specifies a proper time for making a Motion for Directed Verdict is ludicrous and can only be an attempt to cloud and confuse the real issue at hand.

The proper authority which pertains to the Motion for Directed Verdict is found in Kentucky Civil Rule (C.R.) 50.01, as applicable to the Kentucky Rules of Criminal Procedure through R.Cr. 13.04. That rule provides as follows:

> Rule 50.01 Motion for Directed Verdict
>
> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have

> moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. *The order of the court granting a motion for a directed verdict is effective without any assent of the jury.* (As amended by order of the Court of Appeals dated January 14, 1969, effective July 1, 1969.)

It is important to note that this rule does not designate the time at which counsel must make a Motion for Directed Verdict in order to preserve the issue of the sufficiency of the evidence. Rather, the customary procedure and proper time for the making of a Motion for Directed Verdict to preserve the sufficiency of the evidence is determined and set forth by Kentucky case law. At the time of Petitioner's trial, Kentucky case law dictated that the question of the sufficiency of the evidence could have been preserved by making a Motion for a Directed Verdict at the close of the Commonwealth's case *or* at the close of all the evidence, or even in a Motion for a New Trial. [Writ of Certiorari, Appendix B, p. 30.] Counsel did all that was required of him by law at the time of his trial by first moving for a directed verdict at the close of the Commonwealth's case, and thereafter, again raising the question of the sufficiency of the evidence in the Motion For a New Trial. To do anything more would be requiring counsel to perform acts which would have been in vain.

In an attempt to further cloud the fact that *Kimbrough* substantially changed the law after Petitioners' trial, Respondent cites *Delong* v. *Commonwealth,* 225 Ky., 461, 9 S. W. 2d 136 (1928) and *Harvey* v. *Com-*

monwealth, Ky., 423 S. W. 2d 535 (1968) for the proposition that the appellate court of Kentucky had dealt with the exact rule enunciated in *Kimbrough* previously. [Respondent's Brief p. 12.] However, a close examination of those cases reveals that the opinions are absolutely devoid of any language which would indicate, as in *Kimbrough,* that a Motion for Directed Verdict must be made at the close of all the evidence. On the contrary, these two cases support Petitioners' position that it was customary and proper at the time of Petitioners' trial to make a Motion for Directed Verdict at the close of the Commonwealth's case. In both *Delong* and *Harvey,* the defendants had moved for a Motion for Directed Verdict only at the close of the Commonwealth's case. These cases contain absolutely no mention, either express or implied, that the defendant's should have or did move for a Directed Verdict at the close of all the evidence. Therefore, as authority they can support only two conclusions: (1) *Kimbrough* represented a substantial change from the customary procedure of moving for a Directed Verdict at the close of the Commonwealth's case; (2) Petitioners did, in fact, adhere to those very customary procedures at the time of their trial for preserving the sufficiency of the evidence.

Finally, the Respondent suggests that there was sufficient evidence upon which the Petitioners' convictions could stand. Petitioners are somewhat amazed and puzzled by this bold allegation. The short answer to Respondent's allegation is that sufficiency of the evidence has never been at issue in this appeal. All

of the Appellate Courts of Kentucky have conceded that there was no evidence to support the conviction of either BORDERS or CARPENTER. Petitioners would again like to focus this Court's attention on the two Opinions rendered by the Kentucky Court of Appeals and the Memorandum Opinion Per Curiam rendered by the Supreme Court of Kentucky. [Writ of Certiorari, Appendix A, B, C pp. 19-37.] In these Opinions both the Court of Appeals and the Supreme Court of Kentucky have unequivocally held that there was no relevant or sufficient evidence connecting these Petitioners to any charged offenses. In fact, the Supreme Court of Kentucky has already considered the almost identical evidence produced in numbers 1-19 of Respondent's Brief on pages 18-21. After closely reviewing all of this evidence that Court held that "we are of the opinion that the record before us contains no relevant evidence linking CARPENTER and BORDERS to the charged offenses". [Writ of Certiorari, Appendix C, p. 36.] Can the Respondent seriously suggest that there was sufficient evidence to uphold these convictions when the highest Courts of Kentucky have unequivocally held in three separate opinions that there was a total lack of such evidence? Petitioners again submit that the Commonwealth's argument is at best frivolous and only designed to detract from and cloud the real dispute in issue, that is, whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution can permit a conviction to be upheld based upon a retroactive application of a state procedural rule, when it has been admitted by all

Courts of Kentucky that there was no relevant or sufficient evidence to support the convictions.

In conclusion, Petitioners respectfully request this Court to grant the Writ of Certiorari in order to rectify the grave injustice that has been spawned as a result of the state's retroactive application of the *Kimbrough* rule. It is axiomatic that this Court has jurisdiction to entertain a violation of this magnitude which, in effect, goes to the very essence of the Due Process Clause of the United States Constitution.

Respectfully submitted,

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